IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2273 OF 2000

M/s U.K. Paints (India) Ltd.,
A Company incorporated under the
Companies Act, Proprietor of
M/s U. K. Paints Industries, through
its authorised director G.S. Dhingra
s/o N. S. Dhingra, 19 DDA Commercial
Complex, Kailash Colony Extension,
New Delhi – 110 048. ... PETITIONER

-: Versus :-

1. Mumbai Port Trust,
   a body corporate constituted
   under the Provisions of Major
   Port Trusts(Amendment) Act,1974
   through service to be effected
   through Chairman, Port House,
   Ballard Estate, S. V. Marg,
   Mumbai-400 031

2. Union of India,
   through Secretary,
   Ministry of Finance,
   North Block, New Delhi-110 001
   and Advocate for the Central Goods,
   M. K. Road, Mumbai.

3. The Commissioner of Customs-II,
   New Custom House, Ballard Estate,
   Mumbai – 400 038. ... RESPONDENTS

N.K.Mudnaney for the petitioner.

U.J.Makhija with H.Munjee i/b. M/s Mulla & Mulla & C.B.C. for respondent No.1.

S.M.Shah with K.R.Chaudhari and Y.R.Shah for respondents No. 2 and 3.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

DATED : 13th March 2007.

ORAL JUDGMENT : (Per V. C. Daga, J.)

The petitioner, in this case is seeking directions against respondents No. 2 and 3 to issue Detention Certificate entitling it to claim remission in demurrage charges on the goods imported by the petitioner under Licences dated 06/3/1992 and 04/5/1989 under Bill of Entry No. 8810 dated 29/7/1992 with further prayer to direct the respondents to refund to the petitioner Rs. 9,77,066/- deposited by them at the instance of officers of respondent No.1 with further prayer directing respondent No. 1 to forthwith release the goods covered under the aforesaid Bill of Entries without claiming demurrage charges from the petitioner and if at all amounts are found to be payable to respondent No. 1, then directions be issued to respondent Nos. 2 and 3 to pay the same.

Objection of the Petitioner :

2. This petition was adjourned on 30th June, 2006 for further hearing and order since further hearing was necessary to take accounts between the parties, considering the sweep of the interim order which was passed on 23rd November, 2000 and, subsequently, reviewed by an order dated 2nd August, 2001, which had operated between the parties

whereunder the Customs Department was directed to pay wharfage and demurrage charges to respondent No.1- Mumbai Port Trust (MPT).

3. The petition, however, could not be taken up for further hearing and order since one of us (Daga, J.) was required to be at Goa Bench and immediately, thereafter, at Nagpur Bench as visiting Judge. The matter being from Mumbai; falling within the jurisdiction of Division Bench, it was required to be heard at Mumbai only. Even otherwise, one of us (Devadhar, J.) during the relevant time was sitting at Mumbai.

4. After return of one of us (Daga, J.) from Nagpur to Mumbai, this matter was taken up for further hearing to make mutual adjustments after taking accounts between the parties; since the petitioner had deposited part of the amount towards demurrage charges and balance amount was directed to be paid by the Customs Department to Mumbai Port Trust by debiting their account.

5. In order to make adjustment and take accounts between the parties, this petition was taken up for further hearing on two dates i.e. 6th February, 2007 and 12th February, 2007. Rival parties were directed to file affidavits disclosing their respective recoveries and part payments made during the pendency of the petition. None of the parties took any objection based on ***Anil Rai v. State of Bihar***, 2001 7 SCC 318 : AIR 2001 SC 3173.

The petitioner, however, on the previous date of hearing i.e. 26th February, 2007, filed affidavit dated 23rd February, 2007 contending that the matter needs to be released for being heard afresh by regular bench.

6. At this juncture, we may place it on record that the question raised in the petition has already been covered by four judgments of this Court. Some of them are unreported and some are reported. The same are referred in the body of this judgment.

7. It is needless to mention that having heard oral submissions at length, on more than 3 to 4 occasions backed by written submissions of the rival parties, having spent considerable judicial time in hearing this matter, it would not be fair on our part to release the matter of which hearing has not been concluded. Ratio of ***Anil Rai's case*** is not at all attracted in the facts of this case. The objection raised in this behalf is, thus, overruled. Hence this judgment.

FACTUAL ASPECTS :

The factual aspects giving rise to the present petition are as under :

8. The petitioner is a Limited Company engaged in the manufacture of high grade paint and varnish including synthetic white enamel. The petitioner is

holding Central Excise Registration Certificate for its products. It has been exporting goods for more than 25 years.

9. That the petitioner, being exporter of such products in large scale, had imported Reigned, Bleached and Deodorised (R.B.D.) soyabean oil under Duty Exemption Entitlement Certificate (D.E.E.C.) Scheme against Advance Important Licence. The petitioner in the past had cleared goods duly imported by it under the Duty Exemption Certificate Scheme viz. 50.16 MT vide Bill of Entry No. 1821/109 dated 17.8.1990, 268.830 MT vide Bill of Entry No. 2080/223 dated 21.9.1990, 72.960 MT vide Bill of Entry No. 2166/192 dated 10.1.1990 and 192.400 MT vide Bill of Entry No. 887/129 dated 10.5.1991. The petitioner had also imported some consignments of Soyabean oil sometime in the month of March, 1992 without payment of duty against the advance licences issued to it for import of goods under Duty Exemption Scheme.

10. The aforesaid goods imported by the petitioner were detained by the Customs authority although according to the petitioner, the same were covered under the notification dated 30/3/1990 which permitted import of the said goods at 'nil' rate of duty.

11. The petitioner vide it's letter dated 12/5/1993 lodged a protest with the respondent No.3 for the act of detention of the said goods as

the same were duly covered under the advance licenses issued under Duty Exemption Scheme.

12. Respondent No.3 on 26/5/1993 issued show cause notice to the petitioner to show cause as to why the goods in question should not be confiscated under Sections 111(d), 111(m) and 111 (o) of the Customs Act, 1962 (the Act). The said show cause notice was replied by the petitioner on 14/6/1993.

13. The Collector of Customs vide its order dated 15/28th July, 1993 confiscated part of the said goods and allowed clearance of the goods on payment of redemption fine and appropriate customs duty with penalty quantified in the sum of Rs. 4,00,000/- (four lacs) only.

14. Being aggrieved by the aforesaid order, the petitioner preferred appeal before the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (the Tribunal for short). The Tribunal was pleased to remand the matter vide its order dated 30/9/1994 for fresh adjudication after obtaining fresh Test Report and also after examining the chemical examiner.

15. The petitioner states that after second adjudication order came to be passed by the Commissioner of Customs-II on 03/3/1997; the said order was carried in appeal before the Tribunal. The Tribunal vide its order dated 19/9/1997 again

remanded the matter with directions to draw fresh samples of the consignments in question with direction to get it examined through autonomous institution as may be agreed by the assessee.

16. The matter after remand again came to be adjudicated upon by the Commissioner for Customs (Import), Mumbai for the third time denying benefit of exemption of Notification dated 30/3/1990 to the petitioner. With the result, again the matter was taken up in appeal before the Tribunal by the petitioner.

17. The appeal filed by the petitioner was, ultimately, allowed on 06/12/1999 and the goods were allowed to be cleared without payment of customs duty and/or penalty.

18. The fact that the subject goods imported by the petitioner valued at Rs. 21,57,404/- under Bill of Entry No. 89810 dated 21.7.1992 were duly covered under Duty Exemption Entitlement Certificate Scheme against Advance Import Licence is no longer in dispute since it has been finally and conclusively held so by the Tribunal vide its order dated 6.12.1999 and that the said order has not been challenged either by the petitioner or by the respondents, with the result, the same has become final and conclusive. The petitioner in this backdrop, vide their letter dated 07/01/2000 addressed to respondent No.1 placed above facts before them and requested for waiver of the

demurrage charges. The petitioner by another letter dated 31.1.2000 addressed to the respondent no.3, requested for issuance of detention certificate contending that goods were detained for no fault of the petitioner. The petitioner also addressed another letter dated 4.2.2000 to respondent no.1 and requested for remission of demurrage charges.

19. The respondent No.1 by its letter dated 03/8/2000 addressed to the petitioner agreed to grant remission of 80% of the demurrage charges accrued on the consignment subject to the clearance of goods within four weeks from the date of communication.

20. In reply, the petitioner vide it's letters dated 14/8/2000, 18/8/2000, 14/9/2000 addressed to the concerned officers of respondent No.1 pointed out that it had already paid a sum of Rs.9,77,066/- and the condition of Soyabean oil had deteriorated considerably with the result it did not fetch proper market price. The respondent no.1 was requested to reconsider the matter in a sympathetic manner.

21. The respondent No. 1 vide its letter dated 03/10/2000 stated that the remission of 80% of demurrage was granted under TCR No. 61 dated 18/7/2000 up to 31/8/2000 and on recovery of full demurrage for the extended period from 01/9/2000 till the date of clearance. Since the petitioner did not comply with the direction issued by

respondent No.1, respondent No. 1 vide its letter dated 11/10/2000 informed the petitioner that the goods would be sold by auction under the provisions of Section 61 and 62 of the Major Port Trust Act on 30/10/2000 or any other subsequent date. On 30/10/2000 or thereafter the goods could not be put to auction sale. Consequently, the petitioner rushed to this Court with the present petition and invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India with the prayer mentioned in the opening part of this judgment.

22. This Court, while granting rule on this petition, was pleased to pass the interim order on 23/11/2000. The goods were released by interim order with further direction to respondent No.2 to give a Bank guarantee to respondent No.1 with direction to respondent No.1 to release the goods forthwith in favour of the petitioner on receiving the Bank guarantee. Since respondent No.2 failed and neglected to give bank guarantee, the respondent No. 1 did not release the goods, consequently, petitioner was required to file Contempt Petition No. 31 of 2001 in this Court. During the pendency of the petition, respondent No. 1 got their dues from the Customs Department i.e. Central Government by making book entry. In other words, the amount of demurrage charges was recovered by Port Trust from Union of India by making book entries in their respective accounts and released the goods in favour of the petitioner.

23. At this juncture, it will be relevant to mention that the above order dated 23/11/2000 passed by the Division Bench of this Court came to be reviewed in Review Petition No. 1 of 2001 on 02/8/2001 which reads as under:

> "The learned Additional Solicitor General appearing for the petitioners (Union of India & Customs) states that adjustment in respect of payment of demurrage charges is made between the Customs and the Mumbai Port Trust (Respondent No.1). The learned Counsel for respondent no.1 accepts this.
>
> The learned Counsel for the Respondent No.1 states that as per the order dated 23rd November, 2000 and in view of the correspondence entered into (xerox copies thereof taken on record), the goods have already been released without collecting the demurrage charges.
>
> Therefore, it is not necessary now for the petitioners to give any Bank Guarantee as per the order dated 23rd November, 2000. To that extent the said order is reviewed..."

24. The perusal of aforesaid order would show that the Union of India made payment of the demurrage charges to respondent No.1 without first getting the order modified or reviewed and paid

demurrage charges by making a adjustment in respective books of accounts. The respondent No.1 after getting their dues through book adjustment released goods in favour of the petitioner without collecting or without claiming any security for the demurrage charges from the petitioner. The respondent no.2 was exempted from giving Bank Guarantee in favour of respondent no.1 since amounts were paid by book entry as such order dated 23.11.2000 to the extent it had directed security by way of bank guarantee came to be reviewed.

With the aforesaid chronology of the events available on record the petition was heard by us.

THE RIVAL SUBMISSIONS :

25. The learned Counsel for the petitioner urged that the Tribunal in its final order has observed that the petitioner was a recognized export house exporting synthetic enamel, white paints and that in the manufacture of while paint, refined soyabean oil along with other chemicals is required to be used. Soyabean oil can be used as food and also for industrial purposes. The soyabean oil imported by the petitioner was usable in manufacture of their product viz. paint and varnish. That in the notification dated 30/3/1990 it was provided that the importer had to execute a bond or legal undertaking before Customs for complying with the conditions specified in the notification and there was a built in mechanism in notification to ensure use of imported goods in

resultant products. That after considering the Test Report, the Tribunal in its judgment and order has recorded that there was no evidence of any malpractice practiced by the petitioner and that there was no material on record that the goods were not for the purpose for which they were declared and that any possible alternative use would not justify the denial of exemption in the facts and circumstances of the case. The Tribunal thus found nothing adverse on record so as to reach to the conclusion that the goods imported did not conform to the specifications of ASTM No. T-1462/70.

26. Learned counsel for the petitioner further submits that in the impugned judgment and order the learned Tribunal has referred the case of ***Wipro Ltd.,*** 1996 (81) ELT 28; wherein it was observed that, although it was the duty of the respondents to investigate violations of the provisions of the Act, respondents also owed duty to those affected by their actions; not to cause them undue hardship. It is thus submitted that the petitioner's request to the Customs authorities to issue detention certificate ought to have been granted being justified since the goods were detained by the Customs for no fault of the petitioner.

27. Learned Counsel for the petitioner reiterated that by letter dated 04/2/2000 addressed to the Mumbai Port Trust, the Port Trust was requested to clear the consignment without

payment of demurrage charges. By letter dated 20/7/2000, the Port Trust was also requested to note that they had already received Rs. 9,77,066/- which were paid considering the current value of the consignments because of the deterioration and leakage, the value thereof was not more than Rs.10 to 12 lakh. No further demurrage charges were payable as such petitioner was entitle to receive refund of the said amount of Rs.9,77,066/-.

28. The learned counsel for the petitioner urged that the Mumbai Port Trust vide their letter dated 03/8/2000, granted remission of 80% of the demurrage fees provided the goods were cleared within four weeks from the date of communication of the decision. Thereafter, again on 14/8/2000, 18/8/2000 and 19/9/2000 further letters addressed by the petitioner to Mumbai Trust praying for remission of demurrage charges but no heed was paid by the respondent No.2.

29. Learned counsel for the petitioner further urged that pursuant to the interim order, the Mumbai Port Trust had released the goods, and therefore, petition as against the Mumbai Port Trust has been worked out. The petitioner, to prevent the Port Trust from auctioning the goods, had to deposit Rs.9,77,066/- and in view of the above, the petitioner is entitled to claim refund of the said amount.

30. Learned Counsel for the petitioner, in support of his submissions relied on the judgment in the case of ***Padam Kumar Agrawalla vs. The Additional Collector of Customs, Calcutta*** reported in AIR 1972 SC 542 and submitted that the appellant has been unlawfully deprived of possession of valuable goods, as such it would be fair and just that Customs Authorities who are responsible for creating this situation, should be made to bear the liability of the respondent No.1 Port Trust.

31. Learned Counsel for the petitioner further submits that the Madras High Court, in the case of ***Anuma Precision Tool Pvt. Ltd. vs. Collector of Customs, Madras,*** 2000 (121) E.L.T. 309 (Mad), in the similar circumstances, relying upon the above judgment in the case of ***Padamkumar Agrawalla*** rely had ordered refund of the demurrage charges paid by the petitioner therein.

32. The learned Counsel for the petitioner relying upon of Union of India vs. Mansingka Industries Pvt. Ltd. reported in LXXVII Bombay Law Reporter pg. 663, submitted that this Court while dealing with the case under Central Excises and Salt Act, 1944, which contained the provision identical to Section 155 of the Customs Act had held that looking to the phraseology of the section, the provision is intended to bar a remedy by way of suit and to afford protection to the

action taken under the Act. That the Section only applies to suits in respect of damages and compensation. According to him, questions of collection of illegal duty and/or recovery are not the questions dealt with by this provision.

33. The learned counsel for the petitioner further submits that the petitioner has not claimed any damages or compensation against the Customs authorities for which customs can claim immunity under Section 155 of the Customs Act. The issue involved is one of equity and the liability of payment of demurrage charges, not by way of damages or compensation, but as a normal consequence of wrongful withholding of goods which were, ultimately, by an order of CEGAT ordered to be released without payment of any Customs duty. It is thus submitted that ratio of the judgment of Supreme Court in case of ***Padam Kumar Agrawalla vs. Additional Collector of Customs*** (supra) should be made applicable to the facts of the present case and the petition be allowed.

34. Learned counsel for the petitioner submits that immunity under Section 155 of the Customs Act is not applicable to the facts of the case in view of the fact that four earlier consignments of soyabean oil which were imported by the petitioners under D.E.E.S. from the same consignor (as in the instant case), were cleared by the Customs authorities without getting test report and without imposition of any duty. According to him, this

fact has not been denied by the Customs authorities in their affidavit in reply, and therefore, heavy burden was upon the Customs authorities to prove that they had acted in good faith. In support of these contentions the learned counsel for the petitioner relied upon the case of Kailas Sizing Works vs. Municipality of Bhivandi and Nizampur reported in AIR 1969 Bombay-130.

35. The learned counsel for the petitioner while concluding his submissions, contended that although in the amended part of the petition, it has not named any officer of the Customs, who was acting with bias and prejudice against the petitioners, but in reply to the show cause notice dated 14.6.1983 annexed to the petition, the petitioner did contend that the officer issuing the notice namely Shri Anil Kumar, Assistant Collector of Customs, Central Intelligence Unit had been acting with bias against the petitioner. The Custom authorities had annexed three test reports to the show cause notice out of which first two test reports did not support the Customs and, therefore, the third report was obtained which was not accepted by CEGAT, and despite remand, no fresh test reports were obtained. That as per the policy and guidelines, respondent No.1 was bound and liable to give remission of 80% of demurrage accrued for the period of detention of goods for which petitioner was not at fault. According to the petitioner, they are not liable to pay demurrage charges claimed by respondent No.1 and in

any event if the same are payable, respondents No.2 and 3 are liable to pay the same by reason of wrongful detention of the goods by the Customs authorities. The petitioner had to deposit Rs.9,77,066/- with respondent No. 1 without any fault on its part and had to suffer twin loss, one by way of deterioration in the quantity of goods and secondly resultant by loss of business. That is how the petitioner has seriously disputed its liability to pay demurrage charges in the range of Rs. 50,00,000/- besides the amount of Rs. 9,77,066/- already paid by it.

36. *Per contra*, the learned Counsel for the respondent No.1 opposed the petition and urged that, it would not be fair and proper to shift liability of the petitioner to pay the warehousing charges on the respondents no. 2 and 3, the Central Government. He submits that under Section 155 of the Customs Act, no liability can be fastened upon the Customs Authorities for the acts done by the officers of the Customs department in good faith and in pursuance of the Act or the rules or regulations made thereunder.

37. Relying upon the judgment of this Court in the case of ***Modern Rubber Industries vs. Union of India*** reported in 2003 (154) E.L.T. 541 and the decision of the Apex Court in the case of ***Union of India vs. RCF (P) Ltd.*** reported in 2002 (1) Supreme Court Cases 718, learned counsel for the respondents submitted that even where the orders

passed by the Customs authorities have been ultimately set aside, it has been held that the liability to pay the warehousing charges would still be upon the importer and not on the Customs authorities and, therefore, in the facts of the present case, in the absence of any mala fides, liability to pay warehousing charges cannot be shifted upon the respondents no. 2 and 3-Central Government.

38. Learned counsel for the respondents further submitted that in view of the delay in assessing the goods imported by the petitioner, the Customs authorities can issue the requisite detention certificate to enable the petitioner to seek waiver of demurrage charges from the C.W.C. However, according to him this is not a case wherein petitioner would be entitled to such such certificate. Accordingly, the learned counsel for the respondents submitted that the claim of the petitioner that the Customs authorities should be directed to pay the warehousing charges is legally unsustainable in law.

39. Learned Counsel on behalf of respondent No.1 submitted that although an affidavit in reply has not been filed in the present case by it, the C.W.C. had taken out a civil application bearing No. 2524 of 2005 seeking an order directing the petitioner to pay the outstanding warehousing charges. In the said civil application, relevant facts have been set out regarding warehousing

charges payable on the goods imported by the petitioner.

40. The learned Counsel for the C.W.C. submitted that the liability to pay the warehousing charges till the goods are assessed by the Customs authorities cannot be disputed by the petitioner. Even after the assessment, if the petitioner wanted to keep the goods in any other nearby warehouse, it was obligatory on the part of the petitioner to pay the warehousing charges already incurred on the consignment. In his submission, no fault can be found with the action of the C.W.C. in declining to waive the charges and permitting the shifting of the goods on payment of charges already incurred on the consignment. The Counsel for the respondents submitted that there is no merit in the contention of the petitioner that the respondent must waive the warehousing charges and, accordingly, submitted that the petition is liable to be dismissed.

THE ISSUE :

41. In the above backdrop of rival submissions, the only issue which survives for consideration is:

> Who is liable to pay demurrage charges leviable by respondent no.1?

CONSIDERATION:

42. Having carefully considered the rival submissions, having perused the records and also

the authorities cited before us, we must observe that the basic liability to pay the warehousing charges is primarily on the importer; who stores the goods in the warehouse. From the various decisions cited by the counsel on both sides, it is evident that the liability to pay the warehousing charges may shift from the importer to some other person depending upon the facts of each case. In a given case, liability to pay the port charges may be shifted upon the Customs authorities if it is found that the said liability is attributable to the inaction or inordinate delay on the part of the Customs authorities in assessing the goods. However, there cannot be fixed period for finalising the assessment of the imported goods. Therefore, in a given case, whether the time taken for assessment is reasonable or not and whether the liability to pay charges has occasioned solely on account of the delay in assessment of the goods will have to be seen from the facts of each case.

43. In the present case, the petitioner had imported goods. After import of goods, it was open for the Customs Department to assess the same and to find out as to whether the goods were meant for human consumption or otherwise or for industrial use. In that view of the matter, it was reasonable for the Department to take Test Reports into account. The act of the Department in insisting upon the Test Report cannot be said be an act actuated by malice. While considering the case on hand, it will also have to be taken into account

that the petitioner had suffered order at the hands of the adjudicating authority, though the same was set aside by the Tribunal, and the proceedings were remanded back by the Tribunal for reconsideration on two occasions. It is, thus, clear that the Tribunal itself on first two occasions was not very sure as to whether the goods imported were meant for human consumption or industrial use. Twice the re-investigation was directed by the Tribunal. Had it been open and shut case, the Tribunal would have allowed the appeal of the petitioner in the very first round of litigation. The very fact that it was directed to be reinvestigated on two occasions that itself is sufficient to demonstrate that, there was not only an arguable case for Revenue, but it was a case for further enquiry. The case for enquiry need not be an iron caste case. It is enough if the case is arguable. It is only on third occasion when the matter reached the floor of the Tribunal, the evidence was crystalised and Tribunal could take into account the entire material to take a particular view of the matter. In this view of the matter, if the delay has caused in adjudication of the show-cause notice, no fault can be found with the adjudicating authority.

44. The petitioner has also tried to allege malafides against one Anil Kumar, Assistant Collector of Customs. However, he has not been joined as a party to the petition. Needless to mention that it is a settled principle of law that a person against whom malafides are alleged, must

be a party to the petition so that he gets an opportunity to reply allegations made against him. In absence of Shri Anil Kumar being party to the petition, the allegations of malafides and bias made against him hold no water. (See: ***A.P. Electrical Equipment Corporation v. its Staff Union* – 1986 Lab. I.C. 1851 para 12).**

45. It is a settled position of law that person alleging malafide must give necessary particulars of malafides. In absence of material particulars and pleadings in the petition, it is not obligatory on the part of this Court to investigate the allegations made. A person seeking to invalidate an administrative or quasi judicial order on the charge of malafides has to establish the charge of bad faith by furnishing the necessary particulars. What the party in such a case has to prove is not malice in its legal sense. He has to prove malus animus indicating that the action was actuated either by spite or ill-will against him and by indirect or improper motive. (See: ***Tarachand v. Delhi Municipality, AIR SC 567 and Kedarnath v. State of Punjab*, AIR 1979 SC 220).**

46. In sum and substance, malafides must be shown and proved by cogent material on record. The petitioner must show that the power was exercised with ulterior motive to defeat the statutory right of the party interested. In the case on hand, there is no whisper in the entire petition as to the malafides and there are no malafides alleged giving

material particulars.

47. Even otherwise, in none of the earlier rounds of litigation, the allegations of malafides were made against Shri Anil Kumar. As a matter of fact, it was expected on the part of the petitioner to raise the said issue and obtain appropriate finding in that behalf in the earlier rounds of litigation. Had the Tribunal recorded any finding in this behalf favourable to the petitioner the things would have been different. Attack on the impugned action of the Revenue on the ground of malafides and bias could have been and ought to have been made a ground of defence since it was available in the earlier rounds of litigation. No such attempt was made. Consequently, order of Tribunal would operate as constructive res-judicata. (See: ***The Workmen of Cochin Port Trust v. The Board of Trustees of Cochin Port Trust & anr.*, AIR 1978 SC 1283 para 8).**

48. We find much substance in the submission advanced by the learned counsel for the Revenue. Under Section 155 of the Act, all the actions of the officers of the Government or Local Authorities for anything done, or intended to be done in good faith, in pursuance of the Customs Act and Rules or Regulations are protected. None of the authorities have recorded any finding saying that the orders passed by the authorities below were mala fide and that they were actuated by malice. If none of the orders were mala fide and if each of the orders of

the authorities below can be justified on the ground of bona fide action, then, in that event we are of the opinion that the Customs Department cannot be saddled with the warehousing charges.

49. The Apex Court in the case of ***Board of Trustees of the Port of Bombay v. I.G. Supplying Co.*** reported in AIR 1977 SC 1622 has held that even though the delay in clearing the goods was not due to negligence of the importer for which he could be held responsible, yet he cannot avoid the payment of demurrage as the rates imposed are under the authority of law, the validity of which cannot be questioned. The Apex Court has reiterated the said proposition of law in the later decisions in the case of ***International Airport Authority of India v. Grand Slam International***, 1995 (77) ELT 753 and in the case of ***Trustees of Port of Madras v. Nagavedu Lungi & Co.***, 1995 (80) ELT 241. In the case of International Airport Authority of India v. Grand Slam international (supra), the Supreme Court relying on ***Board of Trustees of the Port of Bombay v. Jai Hind Oil Mills Co.,*** **(1987) 1 SCC 648**, observed as under :-

> "65. Board of Trustees of the Port of Bombay v. Jai Hind Oil Mills Co. is the third of such decisions of this Court. There, the provisions of the Major Port Trust Act, 1963, which were under examination of this Court having been found to be in pari materia with the provisions of the Ports Act considered by this Court in

Aminchand Pyarelal and Indian Goods Supplying Co. by following the decisions rendered therein, it was held thus:

> The power of a Port Trust to fix rates of demurrage and to recover the same from an importer or exporter (although the question of an exporter paying demurrage arises rarely) under law and to show concession as regards demurrage charges in certain specified cases is recognised by the Court in the Trustees of the Port of Madras v. Aminchand Pyarelal and in the Board of Trustees of the Port of Bombay v. Indian Goods Supplying Co. These decisions are are no doubt based on the relevant laws which were in force at the material time. But the relevant laws which were in force at the material time. But the decisions are still relevant insofar as cases arising under the Act because the Act also contains provisions more or less similar to the statutory provisions considered in the said decisions. Demurrage charges are levied in order to ensure quick clearance of the cargo from the harbour. They are always fixed in such a way that they would make it unprofitable for importers to use the port premises as a warehouse. It is necessary to do so because congestion in the ports affects the free movement of ships and the loading and unloading

> operations. As stated earlier, the Port Trust shows concessions to the party concerned in certain types of cases."

In the above case, the Apex Court also made the following observations :-

> 66. From the above decisions of this Court it becomes clear that an authority created under a statue even if is the custodian of the imported goods because of the provisions of the Customs Act, 1961, would be entitled to charge demurrages for the imported goods in its custody and make the importer or consignee liable for the same even for periods during which he/it was unable to clear the goods from the customs area, due to fault on the part of the Customs Authorities or of other authorities who might have issued detention certificates owning such fault."

> 67. Thus, the above decisions of this Court which uphold the power of Port Trusts created under Ports Act to levy and collect demurrage charges for goods they keep as custodians for Customs Department from the consignees notwithstanding the detention certificates issued by the Customs Department clearly support the view I have taken that the IAAI, an authority constituted under the International Airports Authority Act, 1971, when is entitled to collect charges for keeping custody of the imported goods by regulations made thereunder and according to its policy, the Collector of Customs or his delegatee could not direct the

> IAAI by issuance of a detention certificate to release the goods of the importer without collection of the charges liable to be paid in respect thereof, inasmuch as the Collector of Customs or his delegatee has not been empowered under the provisions of the Act or its Rules or its Regulations to direct release of the imported goods without collection of keeping charges, for the keeping of which by the IAAI, charges are to be paid under the Rules made under the International Airports Authority Act, 1971."

50. The above case has been followed by the Apex Court in its subsequent judgment in the case of ***Union of India & anr v. R.C. Fabrics (P) Ltd & anr.*** reported in (2002) SCC 718; wherein the Apex Court observed as under :-

> "The High Court has directed that the Customs Department would pay the demurrage, container charges and ground rent to the Corporation from 16.1.1991. The said direction is contrary to the decision of this Court in International Airports Authority of India v. Grand Slam international. The Corporation is entitled to recover its charges from the importer. Therefore, the direction in the impugned judgment and order that the Customs Authorities shall pay those charges is set aside. Thus, the appeal filed by the importer (CA No.7931 of 1995) deserves to be dismissed. In any event, no one has appeared in support of that appeal."

51. In the above view of the matter, we find that delay in clearance of goods cannot be attributed to the Customs Department and the petitioner cannot be absolved of its liability to pay demurrage charges payable on the goods imported by the petitioner on any count muchless on equitable consideration as canvassed by the petitioner. The petitioner cannot claim equity in its favour since the petitioner itself has failed to clear goods when conditional remission in demurrage charges were offered by the respondent no.1. The petition is, thus, devoid of any substance.

52. Having taken the above view and reached to the conclusion that the petition is devoid of any substance and liable to be dismissed, now, this Court has to put clock back so as to leave the parties in the same position in which they were before passing the interim order dated 23rd November, 2000. This Court vide interim order dated 23rd November, 2000 had allowed release of goods with direction to the respondent no. 2 to secure demurrage charges by furnishing bank guarantee in favour of respondent no. 1, Mumbai Port Trust. Instead of furnishing security by way of bank guarantee, the amount has been paid by the respondent no.2 to the respondent no.1 by book entry without taking prior leave of this Court and made adjustment in their respective accounts.

53. At this juncture, we propose to place it on

record that it was not expected on the part of the respondent no.2 to pay the amount to the respondent no. 1 by book adjustment since this Court had directed security by way of bank guarantee. Respondent no. 2 paid amount to respondent no.1 by book entry without taking leave of this Court. This Court was required to review its order by another order dated 8.2.2001, since the amount was already paid by respondent no.2 to respondent no. 1 by book adjustment.

54. Had there been bank guarantee given by the respondent no.2 to the respondent no.1, the same could have been cancelled and the respondent no.1 could have been left to recover this money from the petitioner in accordance with law. The respondent no.2 would not have been deprived of its liquidity. Be that as it may, the respondent no.2 must now thank itself for its own action and must suffer for loss of its liquidity.

55. Since the petition is being dismissed and the petitioner is being held liable to pay demurrage charges to the respondent no. 1; as a natural corollary respondent no.2 would be entitled to get back its money from respondent no.1 – may be either in cash or by pay order or by adjustment in their respective books of accounts and consequential directions would be necessary directing respondent no.1 to refund or repay the amounts received by it; by credit entry from the respondent no.2. In other words, the respondent

no.2 shall be entitled to the amount paid by it to the respondent no. 2. So long as dues payable by the petitioner are not paid in full and final, all of its properties (movable and immovable) including bank balance will have to be attached and petitioner will have to be restrained from dealing with any of its properties in any manner whatsoever.

56. In the result, petition is dismissed in terms of the following order:

O R D E R

(i) Petition is dismissed.

(ii) The petitioner shall pay to the respondent Nos.2 and 3, within eight weeks from today, entire amount of demurrage charges equivalent to the amount paid by respondent No.2 to respondent No.1 i.e. Rs. 44,15,913/- (Rs. 54,92,979.00 – Rs. 9,77,066.00 = Rs.44,15,913/-) with interest thereon at the rate of 8% per annum from the date of release of the goods from warehouse in favour of the petitioner till repayment in full and final, failing which respondent Nos.2 and 3 shall be entitled to recover the same by executing this order in accordance with law. The respondent No.1 is directed remit or make adjustment of Rs.9,77,913.00 deposited with it by the petitioner to

respondent Nos.2 and 3 within four weeks from today.

(iii) Rule is discharged in terms of this order with no order as to costs.

(iv) Parties are permitted to act on the authenticated copy of this order.

57. At this stage, learned counsel for the petitioner prayed for stay of the effect and operation of this order. In our opinion, it is not necessary to grant stay as prayed since the view taken by us is based on our earlier judgments referred to hereinabove. In the result, prayer made for stay of this judgment is rejected.

Judge. **Judge.**